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No. 00-600

Supreme Court, U.S.
FILED
NOV 17 2000
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In The

Supreme Court of the United States

RYAN'S FAMILY STEAK HOUSES, INC.,

Petitioner,

v.

KYLE DANIELS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does the Federal Arbitration Act (FAA) mandate enforcement of an Arbitration Agreement when State contract law, equally applicable to arbitration and nonarbitration agreements, does not recognize the agreement as a valid contract?

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STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of Tennessee and Kentucky caselaw regarding the formation and enforcement of a contract. The statute cited by the Petitioner, the FAA, will not require any interpretation by this Court as the Respondent would concede that the FAA is applicable.

STATEMENT OF THE CASE

The Respondent applied for a position with Ryan's Family Steak Houses on or about July 9, 1994. As part of the documents required to be completed by an applicant, Kyle Daniels signed what purported to be a "Job Applicant Agreement to Arbitration of Employment-Related Disputes". (Appendix A). Although Daniels did not appreciate it at the time, this Agreement was with a company called Employment Dispute Resolutions, Inc. (hereinafter "EDR" or "EDSI") that had been hired by Ryan's to arbitrate all claims brought by its employee applicants.

The Respondent was ultimately hired but was fired by Ryan's on August 13, 1997 after returning from a short medical leave.

On May 19, 1998, Kyle Daniels filed suit against Ryan's in the United States District Court for the Eastern District of Tennessee alleging, *inter alia*, a violation of the Americans With Disabilities Act. Thereafter, prior to filing an Answer or discovery responses, the Petitioner filed a Motion to Compel Arbitration claiming it was a third

party beneficiary to the Agreement between the Respondent and EDSI.

After hearing oral argument, the District Court refused to dismiss the case or compel arbitration stating, in essence, a valid contract did not exist. *Petition for a Writ of Certiorari,* Appendix B. Thereafter, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit.

On the date that oral argument was scheduled in the Sixth Circuit, another case, *Sharon Floss v. Ryan's Family Steakhouses, Inc.* was also scheduled and was argued. In issuing its Opinion on May 1, 2000, the Sixth Circuit consolidated the Floss and Daniels cases. *Petition for a Writ of Certiorari,* Appendix A.

The Sixth Circuit affirmed the decision of the District Court in finding that no valid contract exists between the Respondent and EDSI. Shortly thereafter, the Petitioner filed a Motion for Full Court Review which was denied by the Sixth Circuit.

ARGUMENT

Kyle Daniels (hereinafter "Respondent"), would respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari filed on behalf of Ryan's Family Steak Houses, Inc. (hereinafter "Petition").

Standard

The standard for reviewing a Petition for a Writ of Certiorari is set forth in the *Rules of the Supreme Court of the United States*, Rule 10, which states as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.

Most importantly, Rule 10 states, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Upon review of the Memorandum Opinion of the United States District Court for the Eastern District of Tennessee (hereinafter "District Court") and the Opinion of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit"), it will be evident to this Court that the basis for each underlying court's refusal to compel arbitration was that the Agreement sought to be enforced was not a valid contract, pursuant to the laws of Tennessee. No question regarding the applicability of the FAA to the Respondent's underlying claim was ever made.[1] The cases to which this Court is cited by the Petitioner with which an alleged "conflict" between the Circuits exist, were not decided on State law grounds, but addressed the FAA's application directly, making them inapposite to this case.

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[1] The Respondent's case, *Kyle Daniels v. Ryan's Family Steak Houses, Inc.*, No. 99-5187, was consolidated by the Sixth Circuit with *Sharon Floss v. Ryan's Family Steak Houses, Inc., et al.*, No. 99-5099. The Respondent filed his suit pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* but did not make any contention that an ADA claim was never appropriate for arbitration. Respondent Floss did, however, allege that arbitration would not allow for the furtherance of the important social policies sought to be addressed by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, under which her claim was brought. However, the Sixth Circuit ruled in favor of the Petitioner and held that the policies furthered by an FLSA claim would not be hindered by arbitration. *Petition for Writ of Certiorari*, Appendix A at 12a, 13a.

Objections to Questions Presented by the Petitioner

The Petitioner raises three Questions in its Petition. They are as follows:

1) In deciding whether an arbitration system is "structurally biased" in violation of the Federal Arbitration Act (FAA), may a District Court presume bias without any evidentiary showing?

2) Does the federal common law of arbitration imply the covenant of good faith and fair dealing into every arbitration contract which falls under the FAA?

3) Is the FAA violated when judicially created contract law is applied in such a manner as to invalidate arbitration agreements which are otherwise enforceable?

Petition for Writ of Certiorari at i.

Question one seems to indicate that the District Court's Memorandum Opinion expressed a finding of "structural bias" which precipitated the Court's refusal to grant the Petitioner's Motion to Compel Arbitration. There was no such finding by the District Court. The District Court stated, "The court finds that the agreement in this case is not a binding contract, and that the employee could not have knowingly executed a valid waiver of his federal statutory rights, including his right to a jury trial." *Petition for Writ of Certiorari*, Appendix B at 24a.[2] The District Court's ruling was based upon a

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[2] The Sixth Circuit affirmed the District Court's holding and found no binding contract but did not address the District Court's finding that the Respondent did not make a knowing

finding of no consideration, no mutuality of obligation and indefiniteness of essential terms, all requirements pursuant to Tennessee law. *Id.*

Question two, like #1, ignores the rulings of the lower courts and seeks to bring this Court's focus on *dicta* of the Sixth Circuit that obviously had no bearing on the Court's determination that there was insufficient consideration and no mutuality of obligation. The Opinion of the Sixth Circuit states, unambiguously, "Though we have concerns with both the fee structure and potential bias of EDSI's arbitral forum, we need not decide whether these deficits prevent the arbitration of Floss and Daniels's [sic] statutory claims." *Petition for Writ of Certiorari*, Appendix A at 15a. As will be discussed, in greater detail below, the Sixth Circuit goes on to state that the parties were not contractually obligated to arbitrate their claims.

The third question is, by far, the closest to being legitimate. It essentially states the same question posed by this Respondent. However, there is one gaping overstatement and that is the portion which states, " . . . which are otherwise enforceable." As presented, this Question asks this Court to "put the cart before the horse." As alluded to by the Sixth Circuit, the first question should be, "Is there a valid contract?" Although in this case, the lower courts found no valid contract, assuming, *arguendo*, that one existed, the next question would be, "Is the arbitral forum suitable to litigate the claims?" The Petitioner wants this Court to first assume

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valid waiver of his right to a jury trial. *Petition for Writ of Certiorari*, Appendix A.

the answer to the second hypothetical query is "yes" instead of determining whether a valid contract requiring arbitration even exists. Although in *dicta*, both lower Courts expressed concern that despite the claims being generally suitable for arbitration, the specific arbitral forum provided by EDSI might not allow for the effective vindication of these claims. *Id.* at 13a.[3] Thus, the Agreement being "otherwise enforceable" is blatantly misleading.

The Petitioner seeks to present Questions to this Court in such a manner that would imply a ruling inconsistent with the FAA, despite clear rulings from the Sixth Circuit and District Court which indicate that this case involves nothing more than a decision not to enforce an agreement under State contract law principles. The fact that the agreement involves arbitration is merely incidental and played little to no role in the decisions of the lower courts. These Questions presented by the Petitioner would not be the issues before this Court should certiorari be granted. The true issue that would be presented, as discussed *infra*, in light of the rulings of the District Court and Sixth Circuit, would be "Does the Federal Arbitration Act (FAA) mandate enforcement of an Arbitration Agreement when State contract law, equally

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[3] Both the District Court and Sixth Circuit noted concern that EDSI retained the right to modify the rules governing arbitration, at any time, without consent or notice to the employee, that the expenses of the arbitrators had to borne, in part, by the employee and the "uncertain relationship" between EDSI and Ryan's Steak House. *Petition for Writ of Certiorari*, Appendix A & B.

applicable to arbitration and nonarbitration agreements, does not recognize the agreement as a valid contract?"

Misstatements of Fact or Law

In keeping with the Petitioner's attempt in its Questions Presented to mislead this Court into believing that a ruling has been made which affects the efficacy of the FAA, the Petition is replete with misstatements of fact and law. On page two (2) of the Petition, the Petitioner begins the "Statement of the Case" section by stating, "These two cases consider whether a nationwide third-party arbitration system, used exclusively for resolving employment disputes, is enforceable under the FAA." *Petition for a Writ of Certiorari* at 2. As detailed, *supra*, this case is about the staples of contract law; consideration, mutual assent, obligation and indefiniteness of essential terms. If the Petitioner's "Statement of the Case" were accurate, we would not be before this Court now, at least not at the instigation of the Petitioner. The Sixth Circuit states, "Ryan's has pursued an acceptable objective in an unacceptable manner. An employer may enter an agreement with employees requiring the arbitration of all employment disputes . . . Yet an employer cannot seek to do so in such a way that leaves employees with no consideration for their promise to submit their disputes to arbitration." *Petition for a Writ of Certiorari*, Appendix A at 19a, 20a.

On page eleven (11) of the Petition, the Petitioner would have this Court believe that "the linchpin of the Sixth Circuit's decision was that the arbitration services provider reserved to itself the right to amend the rules

without the **permission** of the other party to the contract, the employee." [emphasis added] *Petition for a Writ of Certiorari* at 11. Actually, the Court was not as troubled by EDSI's unilateral ability to amend as they were the fact that EDSI never provides a copy of these rules to the employee until they seek to use the arbitral forum (or to utilize a judicial forum) and even then, the rules might have changed many times since the original signing of the Agreement by the employee, as was the case with Kyle Daniels. No notice of the amendment to the employee is required or given by EDSI. The rules contain the essential terms of the contract and yet, the employee never knows those terms and even if he did, they could change and he would never have an opportunity to bargain for that change or be notified of the amendment.

The Petitioner de-emphasizes this additional consideration of lack of notice by selectively omitting a portion of the quote from the Court addressing this issue. The actual quote of the Court is, "Though obligated to provide some type of arbitral forum, EDSI has unfettered discretion in choosing the nature of that forum. **Specifically**, EDSI has reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from, Floss and Daniels." [emphasis added] *Petition for a Writ of Certiorari*, Appendix A at 18a, 19a. As quoted on page ten (10) of the Petition, the word "specifically" is omitted and the Petitioner replaces it with the word "and". *Petition for a Writ of Certiorari* at 10. This is not merely semantics. The Court was indicating that the problem with EDSI having unfettered discretion is **specifically** that they can amend at any

time without notice or consent of the employee who allegedly will be bound by those changes.

The Petitioner further makes allegations that the Sixth Circuit has acted in a discriminatory manner by invalidating arbitration contracts. *Petition for a Writ of Certiorari* at 16. Again, the Petitioner seems to miss the Sixth Circuit's holding: there is no contract. The Sixth Circuit did not "invalidate [an] arbitration contract". The Sixth Circuit applied State contract law to determine that no contract exists. This Court should note that no cases have been cited by the Petitioner which would indicate that the Sixth Circuit looked at consideration, mutual obligation or indefiniteness of essential terms with higher scrutiny in this case, involving an arbitration agreement, than it does when it reviews any agreement to determine if a valid contract exists.

Next, the Petitioner states unambiguously, "*Southland Corp. [et al. v. Keating, et al.]* is controlling in this matter . . . " *Petition for a Writ of Certiorari* at 18. *Southland* did not deal with a contract being found to be invalid. The Trial Court in *Southland* refused to enforce a **valid** contract wherein each party agreed to arbitrate a claim regarding a franchise dispute. 465 U.S. 1 (1984). The California Supreme Court refused to enforce the Agreement based upon a California Code Section [31512] which would act to enforce arbitration agreements where a franchise dispute was involved only if the suit was filed in Federal Court. State Court actions would be allowed to continue despite a valid arbitration agreement specifying arbitration of all claims brought in any court, federal or state. In essence § 31512 acted to usurp the authority and power of the FAA. For the Petitioner in this cause to

unabashedly lead this Court to believe that the *Southland* case is even similar to the facts of this case is clearly meant to mislead and defraud this Court. Even in *Southland*, the Court recognized the two exceptions to enforcement of arbitration provisions pursuant to the FAA: 1) the contract must evidence a transaction involving commerce and 2) such clauses may be revoked upon grounds as exist at law or in equity for the revocation of any contract. This case involves the second exception based upon State contract law. This is not the *Southland* case where a State law directly conflicts with a Federal law thereby attempting to preempt the rights and authority of Congress. *Id.* at 11.

The Petitioner must wrongfully presume that this Court will not read the Opinion of the Sixth Circuit. The Petition states, "The linchpin of the Sixth Circuit's contract law analysis regarding illusory promises, **was neither state law nor [sic] federal law**, but rather the court's selective reading of a treatise, *Williston on Contracts* . . . " [emphasis added] *Petition for a Writ of Certiorari* at 19. On page fifteen (15) of the Sixth Circuit's Opinion or page 17a as provided in the Petition's Appendix, the Court cites a litany of cases from various courts and treatises regarding illusory promises, catalogued as follows: 1 Tennessee Supreme Court case, 2 Tennessee Court of Appeals cases, 1 Kentucky Supreme Court case, 2 Kentucky Court of Appeals cases, 1 North Dakota Supreme Court case, 1 Northern District of Ohio case (federal court) and Am. Jur. 2d Contracts. This hardly reflects that the Court relied solely or even primarily on Professor Williston as the Petitioner has asserted.

Finally, in a last, "all-out" effort to show its disrespect for the Sixth Circuit and, in turn, for this Court, the Petitioner states:

> The Sixth Circuit's decision is the *embodiment of judicial hostility* towards arbitration. This Court's analysis in *Southland Corp.* will not tolerate the Sixth Circuit's arbitrary misapplication of state contract law principles in a manner to achieve *its anti-arbitration agenda.* The Sixth Circuit's analysis turned the FAA on its head; though the statute requires a court to presume an arbitration contract to be enforceable, the Sixth Circuit applied the opposite presumption and then misapplied general contract principles *to create the illusion* that it was acting in conformity with § 2 of the FAA. [emphasis added]

Petition for a Writ of Certiorari at 19.

Rule 15 is clear that the duty of counsel in this responsive Brief is to address any perceived misstatements of fact or law. Sup. Ct. R. 15. Counsel presumes that this Rule is two-fold to require objections in this Brief lest they be waived if certiorari be granted and to point out to the Court when one party is attempting to mislead or defraud the Court to achieve its objective. Counsel has attempted to include only those misstatements that are clear from the record and not those that could be matters of interpretation. In this specific instance, perhaps the most egregious of all misstatements heretofore illustrated, the Petitioner questions the integrity and competency of the Sixth Circuit, meritlessly.

The Petitioner cannot possibly make a meritorious argument that the Sixth Circuit has an "anti-arbitration agenda". It did not take long to find cases wherein the Sixth Circuit enforced an arbitration agreement, especially since they were cited in the Final Brief of the Appellant submitted by the Petitioner to the Sixth Circuit. In *The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308 (6th Cir. 1998), the Court announced that arbitration contracts would be enforced despite the lack of a signature from the non-breaching party. In *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991), the Court rejected arguments that Title VII claims were not subject to arbitration under the FAA. In light of the past decisions of the Sixth Circuit, including the one at issue in this case, it can hardly be said that the Court has an "anti-arbitration agenda" and to do so should not cast a shadow on the integrity of the Court but on the author from which the words were derived.

I. THE FEDERAL ARBITRATION ACT DOES NOT MANDATE ENFORCEMENT OF AN ARBITRATION AGREEMENT WHEN STATE CONTRACT LAW, EQUALLY APPLICABLE TO ARBITRATION AND NONARBITRATION AGREEMENTS, DOES NOT RECOGNIZE THE AGREEMENT AS A VALID CONTRACT.

The FAA states that an agreement to arbitrate shall be valid, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, it is obvious from the face of the statute that the

drafters did not intend for the FAA to usurp State contract law regarding formation, enforcement and revocation of a contract. It is upon those grounds that the District Court and Sixth Circuit refused to enforce this agreement.

The Tennessee Court of Appeals has stated that to prove the existence of a contract, the party seeking enforcement must show that the agreement on which he relies was supported by adequate consideration, that there was a mutual assent to the terms of the agreement and that it was sufficiently definite to be enforceable. *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 933 (Tenn.App. 1984). *See also Smith v. Pickwick Electric Cooperative*, 367 S.W.2d 775, 780 (1963); *Clark v. Small*, 14 Tenn. (6 Yer.) 417, 421 (1834).

Tennessee courts have held that in order to create a binding contract, there must be valuable consideration on both sides of the bargain. Simply stated, consideration is the price for enforcement by the courts.

The Sixth Circuit found that in this case, EDSI promised to provide an arbitral forum and Kyle Daniels promised to use it. The Court found that EDSI's promise did not provide adequate consideration because it was "fatally indefinite" based upon their ability to change the forum and the rules applicable thereto at any time, without notice to the other party. *Daniels v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000).

Although alleged that EDSI's consideration was their promise, EDSI was already legally bound by the Agreement that they signed with Ryan's to provide a forum for arbitration of employment related disputes. A review of

the *Employment Dispute Resolution (EDR) Rules & Procedures* reveals that Ryan's is a "signatory" and is bound to arbitrate claims in the EDR/EDSI forum. (Appendix B, p. App. 6). The Agreement states, "Your potential Employer ("signatory company" or "company") has entered into an agreement with Employment Dispute Resolution, Inc., (EDR)[4] to arbitrate and resolve any and all employment related disputes between the company's employees (and job applicants) and the Company. (Appendix A, p. App. 1). In addition, the District Court made note that such agreement existed between Ryan's and EDSI. *Petition for a Writ of Certiorari,* Appendix B at 23a.

In 1983, the Tennessee Court of Appeals addressed a similar situation in which there were two agreements. The Court stated that what was already promised in the original contract is not consideration to support a second contract. *Dunlop Tire & Rubber Corp. v. Service Merchandise Co., Inc.*, 667 S.W.2d 754, 758 (Tenn.App. 1983). Although the *Dunlop* court was addressing an issue wherein two parties had executed two agreements, the rule of law is still applicable to this situation. Assuming, *arguendo,* that the Appellee, Kyle Daniels provided sufficient consideration to support a contract with EDSI by promising to forego his statutory right to file a lawsuit, what valuable consideration did EDSI give Kyle Daniels? EDSI was already bound to provide an arbitration forum for disputes involving Ryan's. The District Court was correct in

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[4] The Agreement signed by the Respondent purported to be with Employment Dispute Resolution, Inc. (EDR). Apparently, EDR assigned its contract rights to EDSI.

holding that the benefit flows only to EDSI and the Company (Ryan's), not Kyle Daniels. *Petition for a Writ of Certiorari,* Appendix B at 25a.

Assuming basic contract theory, that consideration is something given in exchange for a promise, it is also critical, as pointed out by the District Court and the Sixth Circuit, that the forum provided by EDSI would have to be paid for, in part, by Kyle Daniels if he ever needed to arbitrate a grievance against Ryan's. First, it costs more to file a Complaint with EDSI than it does in Federal Court. *Petition for a Writ of Certiorari,* Appendix B at 25a. In addition, according to Article XVI of *EDR's Rules and Procedures,* the adjudicators, or the three arbitrators who hear your case, assess fees for their time and each party is forced to pay those fees. The Sixth Circuit recognized this, although not the basis for their ruling, and cited another Circuit that refused to enforce a contract that did not require the employer to bear the full cost of arbitration when it was a condition of employment. *Petition for a Writ of Certiorari,* Appendix A at 15a.

In order to enforce a contract in Tennessee, the contract must result from a meeting of the minds, must be based upon sufficient consideration, and must be sufficiently definite to be enforced. *Johnson v. Central Nat'l Ins. Co. of Omaha,* 356 S.W.2d 277, 281 (Tenn. 1962). Indefiniteness as to any essential element of an agreement may prevent the creation of an enforceable contract. *Jamestowne on Signal, Inc. v. First Federal Savings and Loan Assoc'n,* 807 S.W.2d 559, 564 (Tenn.App. 1990).

In this case, the *Rules* contain the essential elements of the Agreement. The *Rules* instruct the employee or

company as to the steps that are necessary to utilize the Arbitration process. More importantly, the *Rules* set forth the price to be paid to EDSI and state that the parties are required to pay additional fees to the adjudicators. Price is always an essential term in a contract. In addition to never receiving the *Rules*, EDSI is given unlimited authority to unilaterally amend the essential terms without notification to or consent of the Appellee. *Petition for a Writ of Certiorari*, Appendix B at 26a. The mutual assent and meeting of the minds contemplated by Tennessee contract law cannot be accomplished by the unilateral action of one party. *Peoples Bank of Elk Valley v. ConAgra Poultry Co.*, 832 S.W.2d 550, 553 (Tenn.App. 1991).

Tennessee law is clear that after a contract is made, it can only be modified with the consent of both parties. *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn.App. 1990).

In essence, both the District Court and the Sixth Circuit found no consideration on the part of EDSI, no mutual obligation and indefiniteness as to essential terms, all requirements pursuant to the laws of the State of Tennessee for the formation of a contract. These are exactly the types of defenses allowed pursuant to § 2 of the FAA.

CONCLUSION

The Petitioner's argument seems to imply that if a State's case or statutory law would ordinarily not find an agreement to be a valid contract, the Court should enforce the agreement as a binding contract anyway since

it involves arbitration. This is clearly not the intent of Congress in the enactment of the FAA.

Their Petition is cleverly phrased, often misleadingly so to paint a portrait for this Court which would indicate that this case centers around an interpretation of the FAA. It does not. Under State law, the District Court and Sixth Circuit found that no valid contract existed. There is no proof that either Court subjected greater scrutiny to this Agreement due to its arbitration subject.

The Respondent would request that this Court deny the Petition for a Writ of Certiorari and remand this case to the District Court for adjudication on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A: Job Applicant Agreement To Arbitration Of Employment-Related Disputes

APPENDIX B: Employment Dispute Resolution (EDR) Rules And Procedures

APPENDIX A

JOB APPLICANT AGREEMENT TO ARBITRATION OF EMPLOYMENT-RELATED DISPUTES

Your potential Employer ("signatory company" or "Company") has entered into an agreement with Employment Dispute Resolution, Inc. (EDR) to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company. The following Agreement between You and EDR is a "selection of forum" agreement by which you agree that employment-related disputes between You and the Company shall be resolved through arbitration. Any arbitration matter shall be heard and decided under the provisions and the authority of the Federal Arbitration Act, 9 USC sec. 1, as applicable.

The purpose of this agreement is to provide You and the Company a forum in which claims or disputes with the Company and any other signatories may be resolved by arbitration rather than litigation. This Agreement does not restrict you from filing a claim or charge with any state or federal agency, for example, Equal Employment Opportunity Commission, state unemployment agency, state workers' compensation commission, where applicable. Rather, the Agreement applies only to State or Federal court proceedings.

A. Acceptance of EDR Agreement

Important aspects of Your acceptance of this Agreement are:

1. You retain all the substantive legal rights and remedies under state and federal law that You would otherwise have as an employee/applicant of the Company, and You will not have any additional substantive legal rights or remedies;

2. You retain the right to file a claim or charge with any State or Federal agency that would otherwise handle Your claim or charge;

3. Except as to claims or charges handled within a state or federal agency, You and the Company agree to use EDR to resolve all legal claims concerning You that either party would otherwise bring in State or Federal Court;

4. An EDR decision on any dispute shall be FINAL AND BINDING on all parties.

B. Agreement

1. Any employment-related dispute between the Company, Me, and/or other signatories which would otherwise be brought in State or Federal court will be brought ONLY in the EDR arbitration forum and under EDR Rules and Procedures, as modified or amended from time to time. (Other signatories to the same Agreement with EDR may be, for example, supervisors, managers, and agents of the Company.)

2. In consideration of the agreement by EDR to provide an arbitration forum, Rules and Procedures, and a hearing and decision based on any claim or dispute I (employee/job applicant) may file or defend, I understand and agree to the following:

A. Except as to claims or changes actually handled within a state of federal agency, any and all disputes I may have with the company, its supervisors, managers or other agents of the Company, or that the Company, its supervisors, managers or other agents may have with Me which would otherwise be decided in court, shall be resolved only through arbitration in the EDR forum and NOT THROUGH LITIGATION IN STATE OR FEDERAL COURT.

B. The decision of an EDR arbitration panel is final and binding on all parties. There is no appeal by any party on the merits of the dispute either to State or Federal court.

C. This agreement is with EDR, not with the Company, and it is not, nor is it intended to be, an employment contract or any part of an employment contract. This agreement does not affect or alter My "at will" employment relationship with the Company.

D. The Company and any successor or assign, its signatory supervisors, managers and other agents, are "third party beneficiaries" of My agreement with EDR, and I am a "third party beneficiary of others' agreements with EDR. A "third party beneficiary" is someone who benefits legally from a contract between two other parties.

E. I absolutely *must* use the EDR forum for any and all employment-related disputes and/or claims and/or related tort claims I may have against the Company and all other signatories to this Agreement which would otherwise be brought in court, even if the Agreement has been terminated since the date of the claim. In

South Carolina and Texas this Agreement shall apply to personal injury tort claims where the company is a "non-subscriber" and is not a covered employer under the state's workers' compensation insurance program.

F. If any of the foregoing terms of the Agreement are determined to be in violation of any law, rule or regulation or are otherwise unenforceable, that determination shall not affect any other clauses of the Agreement. All other clauses shall remain in full force and effect. If any EDR Rule or Procedure is determined by any court of competent jurisdiction to be invalid or unenforceable, EDR shall be permitted a reasonable period of time to amend its Rules and Procedures in order to accomplish the arbitration purpose of this Agreement.

G. My Agreement shall continue for the period of My employment with the Company unless mutually terminated in writing by EDR and Me.

H. My Agreement supersedes any and all prior understandings and agreements between the parties, or with the Company, concerning the resolution of any and all claims or disputes between the Company, its supervisors, managers, and/or other agents, and Me. It contains the entire understanding and agreement of the parties regarding these subjects. My Agreement may not be altered or amended, except in writing signed by the President of EDR and Me.

I. The agreement is effective immediately. *I understand I have the right to consult with an attorney of my choice.*

J. I have read the Agreement carefully and have been given the opportunity to read and consider the full EDR Rules and Procedures. I knowingly and voluntarily agree to be bound by their terms and conditions of the Agreement and EDR Rules and Procedures, as modified and/or amended from time to time.

7/9/94
Date

/s/ Kyle G. Daniels
Name (Please Print)

327 Fisk Hgts Rd
Address

Harriman, TN 37748
City, State, Zip

/s/ [Illegible]
WITNESS*

410 45 9271
Social Security Number

/s/ K.G. Daniels
SIGNATURE

*The agreement must be notarized if not witnessed by an Agent of the Company. 8/15/93

Please indicate whether you wish to be considered for purposes of serving as an "Adjudicator" and participating in hearings and deciding disputes under the EDR Rules and Procedures.

YES _____ NO _____

Note: Your indication of interest is no assurance that you will be selected for Adjudicator training or to serve as an Adjudicator.

Employment Dispute Resolution, Inc.
P.O. Box 500776
Atlanta, Georgia 31150
Inquiries may be directed to EDR's Toll Free Number: 800-892-5335

APPENDIX B

EMPLOYMENT DISPUTE RESOLUTION (EDR) RULES & PROCEDURES

Article I:

Purpose

These rules create a fair, final and binding dispute resolution procedure for all legal issues, claims, and disputes arising in or out of an actual, or potential, employment relationship as an alternative to the federal and state court systems. These Rules and Procedures are intended to minimize the cost, delay and disruption of resolving disputes. The objectives stated herein shall guide the Adjudicators in the interpretation and application of these rules.

These Rules and Procedures neither expand nor limit the substantive legal rights of employers, employees, former employees or job applicants. The substantive rights and remedies shall be the same as those available in a federal or state court.

The parties recognize that the courts today are overcrowded, and time-consuming litigation benefits no one. Therefore, these rules provide a private dispute resolution procedure as an alternative to the federal and state court system. Procedural issues have been simplified and shortened to provide for expeditious resolution of legal issues for all parties' benefit.

These Rules and Procedures are mutually available to all signatories to written EDR agreements, and all signatories are bound by them. These Rules and Procedures are applicable to resolve disputes involving individual or

employer claims and/or claims of several parties, including group or class actions.

Article II:

Scope of Disputes and Parties Covered By These Agreements

Section 1: These Rules and Procedures shall govern any and all:

(a) Legal disputes, claims and/or causes of action, whether federal or state, whether statutory or common law, arising out of, or in the course of, employment or related to the employment or possible employment of all parties signatory to an Employment Dispute Resolution Agreement (EDR Agreement) with Employment Dispute Services, Inc. (EDSI);

(b) Legal counterclaims, cross-claims, and all other civil claims which a signatory Defendant might bring against a signatory Complainant;

(c) Legal disputes, claims and/or causes of action set forth in (a) and (b) above relating to "supervisors" and all other "employees" who are also signatory to an Employment Dispute Services, Inc. Agreement.

Section 2: These Rules and Procedures shall govern any and all legal disputes, claims, and/or causes of action arising under federal or state employment and discrimination laws, including, but not limited to, Civil Rights Act of 1964, as amended, Equal Pay Act, Age Discrimination in Employment Act, Americans with Disabilities Act, Wage and Hour statutes, and all other federal and/or state statutory and common law claims.

Section 3: The terms legal disputes, claims, and/or causes of action include claims in equity. However, any party may seek interim equitable relief from a court of competent jurisdiction in order to maintain the *status quo* of any particular matter.

Article III:

Exclusive and Binding Effect of Adjudication Decision

Section 1: All adjudication decision [sic] rendered under these rules are final and binding to all parties.

Section 2: The signing of an Employment Dispute Services, Inc. Agreement constitutes agreement to comply with the applicable Rules and Procedures of Employment Dispute Services, Inc. then in effect and to the entry of judgment in any court of competent jurisdiction on any adjudication award rendered under these rules.

Section 3: Except as provided in Art. II, Sec. 3, the parties shall be precluded from raising in any other court, including, but not limited to, any federal or state court of law, or equity, and claim or dispute which could have been raised in an adjudication under these rules.

Section 4: If applicable federal law explicitly prohibits the parties from submitting a particular issue to final and binding adjudication, then that issue alone is excluded from final and binding resolution under these rules unless the opposing party to that issue waives and releases, in writing, other claims and/or parties from the effect of these rules, in which case only those specific claims and/or party(s) in the dispute not waived and released shall be decided under these rules.

Article IV

Time Limits For Initiating a Claim

Section 1: For those causes of action where a charge or complaint filed with a government agency is a necessary prerequisite to filing a lawsuit, such filing prerequisite is hereby waived and an EDR claim shall be processed so long as that claim is filed with EDR within the time limits established by law for the filing of such charge or complaint with a government agency in the appropriate geographical jurisdiction.

Section 2: Except as modified by Section 1, the time limits for bringing a claim under these Rules and Procedures shall be the time limits provided in law for any legal claim, dispute or cause of action.

Article V:

Distribution of Rules

A copy of these Rules and Procedures shall be maintained by signatory employers and shall be made available, upon request, to any signatory employee. Any employee may request a copy of the rules from an employer or, by making such request in writing, directly from Employment Dispute Services, Inc.

Article VI:

Representation

Any party to a proceeding may be represented by counsel or by any other individual of their choice. Representation of parties is not required, but is encouraged

inasmuch as the award rendered under these Rules and Procedures is final and binding on all parties.

Article VII:

Interpretation of Rules

Section 1: Prior to the appointment of an adjudication panel, the chief executive officer of Employment Dispute Services, Inc., or his designee, shall interpret these Rules and Procedures and decide any issue which may arise relating to them.

Article VIII:

Request for Adjudication.

Section 1: Any signatory to this agreement may, upon payment of the applicable filing fee, demand adjudication by filing a written claim sent by Certified U.S. Mail to Employment Dispute Services, Inc., with a copy to the adverse party.

Section 2: The written claim shall state the alleged facts and shall cite applicable statute(s), case decision(s), or otherwise describe the legal basis for the claim, dispute, or cause of action alleged.

Section 3: The written claim shall state the following: (1) the Complainant's address; (2) the Complainant's telephone number, and (3) the name, (4) address, and (5) telephone number of Complainant's legal counsel or representatives, if any; and, (6) the name, (7) telephone number, and (8) address of each adverse party.

Section 4: The Defendant shall respond within twenty (20) days of Defendant receiving Complainant's Claim.

Section 5: Any counterclaims, cross-claims, or other claims which a Defendant has must be filed with the Defendant's Answer or, thereafter, within twenty (20) days of Defendant's obtaining knowledge of the facts which would form a basis for the counterclaim, cross-claim or other claim.

Section 6: Any motion to dismiss for failure to state a legal claim may be filed as part of a responsive pleading, and such motion shall be ruled upon promptly by the adjudication panel.

Article IX:

Selection of Adjudicators

Section 1: To resolve any claim, dispute, and/or cause of action, a panel of three (3) Adjudicators shall be chosen. One Adjudicator shall be chosen from each of the following separate selection pools:

(a) Supervisors or managers of an employer signatory to Employment Dispute Services, Inc. Agreements;

(b) Non-exempt employees (non-exempt as defined by the Federal Wage and Hour law) who are signatory to Employment Dispute Services, Inc. Agreements;

(c) Attorneys, retired judges, or other competent professional persons not associated with either party.

Section 2: Employment Dispute Services, Inc. shall provide, listed by selection pool, a list of three (3) potential Adjudicators in each of three (3) selection pools. The Complainant shall strike one name from a pool, then the Defendant shall strike one name until one name from each of the three (3) selection pools remains.

Section 3: Any potential Adjudicator may be struck for cause. Any party moving to strike a name for cause must file a motion with Employment Dispute Services, Inc. stating the grounds for such motion prior to the commencement of the striking procedure set forth at Section 2.

Section 4: The chairman of the Adjudication panel shall be the individual chosen from selection pool (c). In all disputes where the claimed amount in controversy exceeds twenty thousand dollars ($20,000.00) the pool (c) individual shall be a licensed attorney.

Article X:

Pre-Adjudication Discovery, Motion, and Settlement Conference

Section 1: Within sixty (60) days of the Claim being received by Employment Dispute Services, Inc., unless the time period is extended for good cause shown, a pre-adjudication conference should be held, in person or, if agreed upon by all parties, by conference telephone call, including all parties and their representatives, and the adjudication panel. Each party shall provide the following:

(a) Any and all documents to be offered in evidence;

(b) Any and all witnesses to be called and a summary of testimony adduced from each;

(c) Motions, which must have been received by the opposing party at least five (5) business days prior to the date of the pre-adjudication conference;

(d) Opposing party's response to Motions;

(e) A list of any and all issues to be resolved prior to the hearing related to discovery; and

(f) All other information necessary to opening the hearing and a complete presentation of the evidence.

Section 2: Within ten (10) days after the conference, the chairman of the Adjudication panel shall issue binding decisions on all discovery issues presented and notify the parties of those decisions.

Section 3: Failure of a party to timely comply with any decision shall be grounds for dismissal of any claim, cross claim, or counterclaim; an adverse inference being taken; an assessment of attorneys' fees or costs; and/or such other sanction(s) as the adjudication panel deems appropriate.

Section 4: At the Conference, the parties shall also discuss settlement positions and shall have an opportunity to argue any motions received by the adjudication panel and the opposing party at least five (5) business days prior to the pre-hearing conference.

Section 5: The adjudication panel shall set a time, date, and place for the adjudication hearing, which shall be no less than ten (10) days nor more than ninety (90) days after the date of this conference.

Article XI:

Failure to Appear

If any party, after due notice, fails to appear at a hearing or any adjourned hearing session, the adjudication panel may, in their discretion, proceed *ex parte* with adjudication of the dispute. All awards in such cases shall be rendered as if each party had entered an appearance in the matter submitted and had participated fully in the proceedings and such awards shall be final and binding on the parties.

Article XII:

General Provisions Governing Depositions, Subpoenas, Production of Documents, etc.

Section 1: Any party may serve a written request for production of documents upon another party twenty (20) days after service of the written Claim. The requested party shall serve the production of documents request on all parties and file a copy with the adjudication panel. The parties shall endeavor to resolve disputes regarding any production request prior to serving any formal objection to the request. Such efforts shall be set forth in the objection and/or motion to compel.

Section 2: Unless a greater time is allowed by the requesting party, requests for production shall be satisfied or objected to within fifteen (15) days from the date of service. Any objection to a request for production shall be served by the objecting party on all parties and filed with the adjudication panel.

Section 3: Upon the written request of a party whose request to produce is unsatisfied, the matter will be referred to the pre-hearing conference.

Section 4: At least three (3) business days prior to the scheduled start of the hearing, all parties shall update the information provided during the Pre-Adjudication Conference. The Adjudicators may exclude from the adjudication hearing any additional documents or witnesses not previously identified unless such failure was for good cause shown. Further, the Adjudicators may exclude from the adjudication hearing any documents not exchanged or witnesses not identified at that time. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.

Section 5: The Adjudicators and any counsel of record to the proceedings shall have the power of the subpoena process as provided by law. All parties shall be given a copy of the subpoena upon its issuance.

Section 6: Upon request of either party, each party may schedule a deposition of one individual. Either party may file a request with the adjudication panel for additional depositions, but such requests are not encouraged and shall be granted in extraordinary fact situations only and for good cause shown.

Article XIII:

Record of Hearings

A tape recording of all adjudication hearings shall be made by any two members of the adjudication panel. Any party that elects to have the tapes transcribed shall bear the costs of transcription. If the record is transcribed, a copy shall be provided to Employment Dispute Services, Inc. and, upon request and at reasonable cost, to all other parties.

Article XIV:

Standards of Hearing and Decision

Section 1: The adjudication panel is not bound by judicial rules of procedure and evidence but shall consider such rules and shall accord those rules appropriate weight. The adjudication panel shall follow fundamental considerations of fairness and due process.

Section 2: The adjudication panel shall seek to decide the claim as would a court of competent jurisdiction if the matter were presented in court. The adjudication panel shall apply the substantive law of the applicable jurisdiction which was the situs of the employee's employment.

Section 3: The adjudication panel shall not have the power to add to any claims or causes of action beyond those requested in the written Claim or Counterclaim, as amended, and, under no circumstances, beyond those claims or causes of action available to the Complainant in a court of competent jurisdiction. Neither the parties'

agreement to adjudicate nor any of these Rules and Procedures shall add to nor subtract from a Complainant's substantive rights and obligations under the law.

Section 5: Upon request of a party and at the discretion of the adjudication panel, the hearing and award may be bifurcated into a substantive proceeding on the merits and a later proceeding on the remedies. If bifurcated, the remedies hearing shall be held within thirty (30) days after issuance of the substantive award on the merits. In determining whether to bifurcate the proceedings, the adjudication panel shall balance the principles of both expeditious resolution of the dispute and the adjudication process and the importance of adequately focusing evidence and analysis on appropriate remedies, if any. The adjudication panel will ordinarily consider a request for bifurcation at the pre-adjudication hearing conference.

Article XV:

Awards

The Adjudicators' award shall be available to the public and shall include the Adjudicator's fees and expenses, shall be in writing, and shall clearly state that it is a final award. If all parties so request, the award shall set forth findings of fact and a statement of reasons for the results reached. The award should be issued within thirty (30) days of either the conclusion of the adjudication hearing or receipt of timely filed post-hearing memoranda, whichever is later.

Article XVI:

Adjudicators' Fees and Employment History

Section 1: A schedule of adjudicators' fees and their employment history for at least the previous five (5) years, along with related biographical information, shall be published with the list of potential Adjudicators. Potential Adjudicators shall disclose any information which may preclude them from making an objective and impartial decision.

Section 2: Ordinarily the fees and expenses of adjudication shall be borne equally by the parties. However, the party designated in the award as the losing party shall bear between fifty percent and one hundred percent of fees and expenses of the adjudication where the substantive law so requires or where, in the view of the adjudication panel, a party has abused the processes of the EDR Rules and Procedures.

Article XVII:

Right to Modify Rules and Procedures

Section 1: These Rules and Procedures may be modified and amended from time to time by Employment Dispute Services, Inc.

Section 2: A special committee may be convened to review these rules and make recommendations for changes and shall, if convened, be composed, in equal parts of no less than two (2) members from each source, of individuals designated by, or affiliated with, each of the following sources:

(a) Representatives of employers and/or Adjudicators from the Employer pool or their designees;

(b) Representatives of signatory employees and/or Adjudicators from the Employee pool or their designees;

(c) Adjudicators from the attorney/professional pool or their designees;

(d) Officers, agents and/or representatives of Employment Dispute Services, Inc.

Section 3: If any of these Rules and Procedures are declared by a court of competent jurisdiction to be illegal, void, or otherwise unenforceable, than all other Rules and Procedures shall be forced to the full extent provided by law provided, however, that any and all adjudication agreements shall not be enforceable where any court, agency, or other government entity adds to or modifies these Rules and Procedures.

Article XVIII:

Weight To Be Accorded Other Findings Of Fact And Conclusions Of Law

Section 1: The adjudication panel shall consider any findings of fact and/or conclusions of law arising from the facts giving rise to this legal claim or dispute which may have been made by any federal, state, or other agency or by a court of law and shall give such findings of fact and/or conclusions of law the weight and consideration that the adjudication panel deems appropriate.

Section 2: If the facts giving rise to this legal claim or dispute were previously presented in any court of

competent jurisdiction which has rendered a final judgment or order on this or related claims, then, upon motion of Defendant, these Rules and Procedures shall be determined not to apply and this adjudication process shall not be available to such parties for a determination on those facts or claims.

Section 3: If a charge, complaint or claim is pending, or may be brought, before any federal or state agency except a Workers' Compensation agency or an unemployment agency then any party may move for a stay of these adjudication proceedings, until such time as the other charge, complaint or claim is resolved or the time period for filing has expired.

Article XIX

Fee Schedule

Section 1: The following fees and fee provisions are set by Employment Dispute Services, Inc., in its sole discretion, and may be altered or modified from time to time in its sole discretion:

Filing Fee	$200.00
First Nine Additional Complainants	$75.00

Section 2: Based upon a written request setting forth appropriate financial information and after an investigation with which the Complainant shall cooperate fully, the foregoing fees and costs may be waived or postponed by Employment Dispute Services, Inc. when, in its sole discretion, employment Dispute Services, Inc. determines that a party is indigent and financially incapable of paying these fees and costs.

Section 3: Present Address and Telephone Number of EDSI:

Employment Dispute Services, Inc.
P. O. Box 30326
Charleston, SC 29417-0326
Telephone: 800-892-5335

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